Capehorn Industry, Inc.[1] ***and*** **Local 169 Union of Needletrades, Industrial and Textile Employees, AFL–CIO.** Case 22–CA–22095

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On October 30, 1998, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent, Capehorn Industry, Inc., filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

I. FACTS

The Respondent is engaged in the business of converting vans into armored vehicles at its facility in Clifton, New Jersey. The work performed by the production employees at the Respondent's Clifton facility includes welding, mechanical work, and bodywork (i.e., sanding, finishing, and painting) performed following the installation of armor and bulletproof glass. On March 25, 1997, the production employees at the Clifton facility commenced an economic strike against the Respondent for the purpose of gaining the Respondent's recognition of the Union as the employees' bargaining representative. Shortly after the strike began, the Respondent hired employee replacements to supplement its remaining workforce, which consisted of several employees who did not participate in the strike. Additionally, the Respondent executed an agreement with a contractor to perform the bodywork that previously had been performed by some of the striking employees.

On April 29, 1997, the Union sent and personally delivered a letter to the Respondent setting forth an unconditional offer by the striking employees to immediately return to work.[4] Although the Respondent subsequently indicated that it accepted the strikers' offer and would begin to recall the strikers in accordance with its production needs, the Respondent did not immediately reinstate all of the strikers. Rather, the Respondent offered reinstatement to some of the strikers over the course of the several months following the unconditional offer to return to work. As of the date of the hearing in this case, however, many of the strikers had not yet been reinstated.

II. THE JUDGE'S DECISION

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate various economic strikers on their unconditional offer to return to work. In defense of its failure to reinstate the striking employees, the Respondent contended that some of the strikers had been permanently replaced by other employees, and that others had been replaced as a result of the Respondent's execution of a permanent subcontract for the bodywork they previously had performed.

The judge first found, contrary to the Respondent's contention, that the replacement workers hired by the Respondent during the strike were temporary, rather than permanent, replacements. Specifically, the judge found that, absent any documentary evidence or testimony from the replacement employees or the managers who hired them, and given the vagueness of the testimony from the Respondent's vice president that she had guaranteed jobs to some of the replacement workers, there was an insufficient showing to satisfy the Respondent's burden to prove the permanent status of the replacements.

The judge further found that the Respondent's engagement of a permanent subcontractor to perform certain unit work did not serve as a justification for the Respondent's failure to reinstate the striking workers whose jobs were assumed by the contractor. Relying on the Board's decisions in *Land Air Delivery,* 286 NLRB 1131 (1987), review denied 862 F.2d 354 (D.C. Cir. 1988), cert. denied 493 U.S. 810 (1989), and *American Cyanamid Co.,* 235 NLRB 1316 (1978), enfd. 592 F.2d 356 (7th Cir. 1979), the judge found that the Respondent's use of a permanent subcontractor during the strike consti-

[1] In its brief in support of its exceptions to the judge's decision, the Respondent effectively moved that the Board correct the caption in this case to reflect the true name of the Respondent, Capehorn Industry, Inc. There is no opposition to the Respondent's motion. Accordingly, we have modified the caption to indicate the correct name of the Respondent.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We will modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001).

[4] Although the Respondent contended that the letter represented a conditional offer to return to work—as the letter asserted an entitlement to immediate reinstatement based on a characterization of the strike as an unfair labor practice strike—the judge found that the letter did not impose any conditions on the strikers' return to work and, therefore, it represented an unconditional offer. We adopt the judge's finding in that regard.

tuted conduct that was "inherently destructive" of the employees' statutory rights. He reasoned that, in contrast to an employer's use of permanent replacements, the use of a permanent subcontractor effectively would negate the strikers' right to reinstatement and, therefore, their right to engage in protected concerted action. The judge additionally found that in the circumstances of this case, there was no evidence to support the Respondent's claim that business reasons made it necessary to execute a *permanent* subcontract.

Thus, having rejected the Respondent's defenses, the judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate the strikers on their unconditional offer to return to work.

III. ANALYSIS

Section 8(a)(3) of the Act prohibits an employer from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). It is well established that an employer's discouragement of employee participation in a legitimate strike constitutes discouragement of membership in a labor organization within the meaning of Section 8(a)(3). See *NLRB v. Great Dane Trailers,* 388 U.S. 26, 32 (1967) (citing *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 233 (1963)). It is also evident that an employer's refusal to reinstate striking employees would tend to discourage employee participation in a strike effort. Accordingly, well-settled precedent dictates that an employer will be held to violate Section 8(a)(3) and (1) of the Act if it fails to immediately reinstate striking workers on their unconditional offer to return to work, unless the employer can establish a "legitimate and substantial business justification" for its failure to do so. See *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378 (1967). The employer bears the burden of proving the existence of such a legitimate and substantial business justification. Id.

But, even if an employer does present sufficient evidence to demonstrate the requisite business justification, that is not the end of the inquiry. Thus, if the Board finds that an employer's conduct is "inherently destructive of employee rights," no proof of antiunion motive is needed, and the Board may find an unfair labor practice notwithstanding that the employer was motivated by business considerations. In contrast, if the adverse effect of the employer's conduct on employee rights is "comparatively slight," an antiunion motive must be proved to sustain an 8(a)(3) charge if the employer has presented evidence of a legitimate and substantial business justification. *Great Dane Trailers,* 388 U.S. at 33–34.

Applying these principles to this case, we conclude that the Respondent did not establish a legitimate and substantial business justification for its failure to reinstate the striking employees following their unconditional offer to return to work. Accordingly, we find it unnecessary to determine the precise extent to which the Respondent's acts of replacing strikers and permanently subcontracting unit work adversely affected employee rights. See generally *Great Dane Trailers,* supra at 34. Therefore, we do not pass on the Respondent's exception to the judge's finding that the Respondent's execution of a permanent subcontract during the strike was "inherently destructive" of employee rights, nor do we rely on the judge's finding in that regard. Rather, we analyze the Respondent's conduct under *Great Dane Trailers* as if it had a "comparatively slight" impact on employee rights.

We turn then to the Respondent's contention that its permanent replacement of certain striking employees justified its refusal to reinstate them. An employer's permanent replacement of economic strikers as a means of continuing its business operations during a strike has long been recognized as a legitimate and substantial business justification for a refusal to immediately reinstate former strikers. See *NLRB v. Mackay Radio & Telegraph Co.,* 304 U.S. 333, 345–346 (1938). However, the employer bears the burden of proving the permanent status of the hired replacements. See *O. E. Butterfield, Inc.,* 319 NLRB 1004, 1006 (1995). Here, the Respondent relies solely on the statement by its vice president to some of the replacement workers that "as long as [she] had work in [her] company, [she] would give them work to do." The judge, however, discredited the vice president's testimony. Moreover, even if the judge had found the testimony reliable, the above statement would not suffice to establish the permanent status of the replacements. The term "permanent replacement," as distinguished from "temporary," connotes a replacement who will not be displaced by returning strikers when the strike is over.[5] The Respondent's statement here gives no such assurance, and there is nothing to establish what the replacements understood the Respondent's statement to mean. Without more, this ambiguous statement does not represent a "mutual understanding" between the Respondent and the replacements that they were hired on a permanent basis. See *O. E. Butterfield, Inc.,* supra at 1006. Accordingly, we affirm the judge's

[5] *Belknap, Inc. v. Hale,* 463 U.S. 491, 501 and fn. 6 (1983).

> [T]he employer must reinstate strikers at the conclusion of even a purely economic strike unless it has hired "permanent' replacements, that is, hired in a manner that would 'show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis.

finding that the Respondent did not meet its burden to demonstrate that the replacements were hired on a permanent basis.[6]

The Respondent also claims that its execution of a permanent subcontract for unit work previously performed by some of the striking employees justified its refusal to reinstate those employees. However, the judge credited the testimony of the permanent subcontractor who executed an agreement with the Respondent to perform the bodywork,[7] and rejected the Respondent's claim that it had to enter into a permanent subcontracting arrangement because the subcontractor had insisted on a *permanent* subcontract as a condition of doing business with the Respondent. We adopt the judge's finding.

Since the Respondent has proffered no other justification for its utilization of a permanent subcontractor, we conclude that it has failed to present sufficient evidence to support a finding of a legitimate and substantial business justification. Accordingly, the cases cited by the Respondent are all clearly distinguishable.

In *Arthur Corp.,* 246 NLRB 1183 (1979), the Board found no 8(a)(3) violation where the employer failed to reinstate certain former strikers as a result of its permanent subcontracting of the mechanical work they previously had performed. The Board's conclusion, however, was premised on the fact that the employer had made the decision to close the mechanical division for economic reasons, and had taken concrete steps toward such closing, prior to the employees' strike, and even prior to the appearance of the union on the scene. Id. at 1185.

Similarly, the Board in *Elliott River Tours,* 246 NLRB 935 (1979), concluded that the employer—faced with an imminent strike threat and a potential loss of business and customer goodwill if it were to abruptly cancel various river tour vacations—did not commit an unfair labor practice by entering into a long-term subcontract of unit work, where the contractor conditioned its assumption of the immediate season's work on its receipt of the work for the following season as well.

Finally, in *International Paper Co. v. NLRB,* 115 F.3d 1045 (D.C. Cir. 1997), also cited by the Respondent, the court of appeals concluded that the employer did not violate the Act by permanently subcontracting unit work during the course of a lawful lockout. The court reasoned that, even though the employer's act of executing a permanent subcontract did have some (i.e., a "comparatively slight") impact on employee rights,[8] the employer proffered evidence of substantial economic benefits as a result of the subcontracting, thereby establishing a legitimate and substantial business justification for its action. Id. at 1052.

Thus, in each of these cases, the employer was able to sustain its defense that legitimate business reasons justified its subcontracting arrangements. No such justification has been established here.

We additionally reject the Respondent's suggestion that permanent subcontracting is equivalent to other, legitimate measures that an employer can take during a strike and for which no business justification need be shown—such as using permanent replacements (see *Mackay Radio,* 304 U.S. at 345–346), or *temporarily* subcontracting work ordinarily performed by striking workers (see *Land Air Delivery,* 286 NLRB at 1132). There are important policy reasons for distinguishing between these measures, intended to allow an employer to maintain operations while a strike is ongoing, and permanent subcontracting during a strike.[9] The Board emphasized the distinction in *American Cyanamid*: permanently subcontracting work during a strike has the effect of removing jobs permanently from the bargaining unit, whereas hiring permanent replacements substitutes one employee for another, but leaves the bargaining unit work intact. 235 NLRB at 1323. As recognized by the judge in this case, this distinction is significant because

[6] Since we affirm the judge's finding that the striker replacements were temporary, we need not pass on the Respondent's exception to the judge's finding that the Respondent hired three employees, and rehired two former employees, subsequent to the date on which the strikers unconditionally offered to return to work (April 29, 1997). Even accepting the Respondent's assertions that these individuals were hired prior to April 29, 1997, there is no contention or evidence to support a claim that they were hired as permanent employees. Accordingly, regardless of their exact date of hire, the Respondent would be required to dismiss these individuals, if necessary, to effectuate the reinstatement of the striking employees.

[7] With regard to the Respondent's exception that the judge erroneously credited contractor Enrique Garcia's allegedly unreliable prehearing affidavit over his testimony at the hearing, we find the Respondent's claim unsubstantiated. The judge did not purport to rely on Garcia's affidavit, and the excerpts of Garcia's testimony cited by the Respondent are not inconsistent with the judge's findings. Further, even if the judge had considered Garcia's affidavit, under well-established Board precedent, a judge may properly credit a witness's prehearing affidavit over his or her testimony at the hearing. See *Yaohan U.S.A. Corp.,* 319 NLRB 424 (1995), enfd. 121 F.3d 720 (9th Cir. 1997); *St. John Trucking,* 303 NLRB 723 (1991); *Alvin J. Bart & Co.,* 236 NLRB 242 (1978).

[8] The court rejected the Board's conclusion that the employer's use of a permanent subcontractor was "inherently destructive" of employee rights. That, however, does not alter the fact that the court required the employer to present a legitimate and substantial justification for its use of the permanent subcontractor.

[9] See, e.g., *Land Air Delivery,* 286 NLRB at 1132, and 862 F.2d at 357; *American Cyanamid Co.,* 235 NLRB 1316 (1978), enfd. 592 F.2d 356 (7th Cir. 1979). These cases are not directly dispositive of the issue presented by this case, as they involved alleged violations of Sec. 8(a)(5) resulting from the employers' failure to bargain prior to permanently subcontracting unit work during a strike. Nevertheless, we find, contrary to the Respondent's contention, that the general principles articulated in the cases apply with equal force to this case.

permanently replaced economic strikers retain their rights to reinstatement as jobs become available, whereas striking employees whose jobs have been permanently subcontracted lose any potential for reinstatement.

Similarly, an employer's use of temporary measures—such as temporary subcontracting or the use of temporary replacements—does not result in the same detrimental loss of striker reinstatement rights as does permanent subcontracting. See *Land Air Delivery,* supra at 1132. Thus, permanent subcontracting cannot be treated as the equivalent of these other measures. We find that an employer must establish a legitimate and substantial business reason for implementing the permanent subcontract during a strike.[10]

Having rejected the Respondent's claim that the replacement workers it hired were permanent, and that the Respondent's execution of a permanent subcontract was supported by *any* business justification, we find that the Respondent has failed to demonstrate a legitimate and substantial justification for its failure to reinstate all of the former strikers—those who had been temporarily replaced, and those whose jobs have been permanently subcontracted. Consequently, we affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by failing to immediately reinstate the striking employees on their unconditional offer to return to work.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Capehorn Industry, Inc., Clifton, New Jersey, its officers, agents, successors, assigns, and/or representatives, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c) and reletter the subsequent unlettered paragraph as 2(e).

"(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

"(d) Within 14 days after service by the Region, post at its facility in Clifton, New Jersey, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 29, 1997."

Patrick E. Daley, Esq., for the General Counsel.
Murray W. Portnoy, for the Respondent.
Arthur Z. Schwartz, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on July 20, 21, and August 27, 1998. The charge was filed on June 13, 1997, and the complaint was issued on January 30, 1998. In substance, the complaint alleges that the Respondent has failed and refused to recall economic strikers, upon their unconditional offer to return to work.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Company converts vans to armored vehicles. On March 25, 1997, the Respondent's employees commenced an economic strike at the Company's Clifton, New Jersey facility.[1] At the time of the strike and for the preceding 3 weeks, the payroll records show that there were between 31 and 33 production workers employed at the Company. (Excluding Managers Lung Hwa Wei and Peter Wen-Pi Tsai, and office workers Joan Beskin and Mary Ann DeCosta.) In addition to these people, the Company subcontracted out certain work such as electrical and plate glass work which it continued to do after the strike started.

During the strike, some of the workers remained at work and the company hired some new people as well. During the period

[10] See *International Paper v. NLRB,* supra, 115 F.3d at 1052 (employer had burden of showing that its implementation of the permanent subcontract during the lockout was based on legitimate and substantial business reasons).

[1] This was a strike called by the Union for the purpose of gaining recognition. When this was not accomplished, the Union filed a representation petition and won an election that was held on May 30, 1997.

prior to the Union's offer to return to work, the number of nonsupervisory, nonoffice workers listed on the payroll went from 4 (the first week of the strike) to a maximum of 12. In addition, the work of finishing and painting the vans (after being armored), was at first done by a subcontractor named Classic Auto Body and then by a company called EMG Auto Shop. The record indicates that in either case, the "subcontractor" used five people to do the work that otherwise had previously been done by strikers. A more complete discussion of the subcontracting relationship with EMG will be discussed below.

On April 29, 1997, Local 169, Union of Needletrades, Industrial and Textile Employees, AFL–CIO, sent and delivered a letter stating as follows:

> On behalf of all the striking employees of Capehorn Industry, Inc., Local 169, UNITE, AFL–CIO hereby offers, unconditionally and immediately, to return to work at Capehorn Industry Inc. As you know, it is the position of the strikers and the Union that the strike is an unfair labor practice strike and the strikers are unfair labor practice strikers, and therefore that the company is obligated to return them to work immediately. A typed alphabetical list of strikers is attached.
>
> Please notify us at once of your willingness to return all striking workers to their jobs.

The letter characterized the strike as an unfair labor practice strike and stated the Union's position that the Employer was thereby obligated to reinstate all of the strikers immediately. Nevertheless, nothing contained in this letter conditioned the return of any strikers on the return of all, and there is no assertion of any other type of condition which had to be met before any of the strikers would go back to work. Accordingly, the assertion by the Respondent that the Union's April 29 letter was a conditional, as opposed to unconditional offer to return to work, is without merit and the cases cited by Respondent in its brief, are inapposite.

The letter with its attached list of 27 striking employees, was sent to the Respondent by regular mail and fax. Further, a copy of the letter was personally delivered to the Respondent's place of business by Union Representative Rejil Solis at about 3 p.m. on April 29. The Respondent's advisor, Murray Portnoy, responded by fax on the same day and stated:

> Pursuant to your letter of April 29, 1997, the company accepts your unconditional offer and will call the people back to work in accordance with the classifications that are needed for current production requirements.

Notwithstanding the receipt of the Union's unconditional offer, the Respondent did not immediately reinstate the strikers. Some have been offered reinstatement on or after April 29, 1997, and others have not.[2] The Respondent makes two related arguments. First it contends that some of the strikers were permanently replaced by other employees. Second it contends that certain other striking employees have been replaced by a permanent subcontractor.

In converting vans, the Company installs steel plating and bulletproof glass. Before the strike, the Company used its own employees and a number of contractors. Work done by the Company's own employees included welding, mechanical work, as well as sanding, finishing, and painting after armor and glass have been installed. In the latter instance, the bodywork of sanding, finishing and painting had been done in a separate area of the employer's Clifton, New Jersey shop.

After the strike commenced, the Company hired some strike replacements. Also, it made a contract with a company called Classic Auto Body to do the bodywork. However, Classic terminated its arrangement with the Respondent and the Respondent engaged EMG Auto Body to do the bodywork previously done by Classic. In this case, however, the work was to be done by EMG at Respondent's facility as EMG did not have a shop of its own. The Respondent asserts that its arrangement with EMG was for this company to provide services on a permanent basis and that this arrangement was necessary in order to obtain bodywork services and to remain in business.

A. Employee Replacements

Soon after the strike commenced the Company hired some employee replacements to supplement the work force that remained at work. These people were interviewed and hired by Managers Lung Hwa Wei and Peter Wen-Pi. As neither they nor any of the replacement employees were called to testify, and as there is no documentary evidence to show what if any agreements were made as to their employment, there is no credible evidence as to the conditions of their hire. While Lydia Li, Respondent's vice president, asserts that at some time she told some of the replacements that as long as she had work in her Company, she would give them work to do, I do not credit her testimony. In short, there was no credible evidence produced by the Company to show that employee strike relacements were hired on the understanding that they were to be permanent employees.

Li also testified that the Company did not hire any new employees after receiving the Union's offer to return to work. This also was not true and the Company's payroll records show that Aigu Wang, Yong Zhou, and Yong Hul Fang were hired either during the weeks commencing on May 5 or 12, 1997. In addition, the payroll records show that two other people, Blas

[2] The Respondent put into evidence reinstatement offers that it claims it sent to various of the strikers. Some of these had signed return receipts and some did not. These were as follows:

Ramon Berroa—April 29, 1997
Jesus Ulerio—April 29, 1997
Francisco Sierra—April 29, 1997
Confessor Hichez—May 6 , 1997
Roberto Moreta—May 23, 1997
Leanardo Figueroa—June 16, 1997
Freddy Fermin—June 16, 1997
Jose Marte—June 27, 1997
Feliz Samboy—July 3, 1997

In addition to the above, the Respondent sent reinstatement offers to some of the strikers (Jose R. Encarnacion, Christian Soriano, Melanio Cuevas, and Julio Andino) while the strike was still in progress and *before* there was an unconditional offer to return to work. Such letters are clearly not relevant; being simply attempts *during a strike* to induce these people to abandon the strike. They are not, nor can they be considered to be valid offers of reinstatement made in response to the unconditional offer by strikers to return to work.

Oscar Rodriguez and Lei Shao Veneris, who had previously left the Company, were rehired in June 1997.[3] Thus, in five cases the Company, after the Union had offered to return to work, either hired new employees or rehired people who had previously left its employ, before reinstating some of the strikers.

B. Subcontractor Replacements

As previously noted, the Company used subcontracting before and after the strike to do certain functions. That subcontracting is not an issue in this case. What is at issue is only the subcontracting done by EMG Auto Body as this was work that had been done by the Respondent's own employees before the strike started. There is no question but that a deal was made between the Respondent and Enrique Garcia before the Union made the offer to return to work. There is also no question but that EMG used approximately five people, including Garcia, to do the work. If that contract had been discontinued after April 29, there would have been openings for five strikers.

After the strike began, the bodywork was initially subcontracted to Classic Auto Body but that company stopped doing the work after the Union sent a letter to it requesting that it cease doing business with Capehorn. Li contends that the Respondent entered into a permanent subcontracting arrangement with Enrique Garcia of EMG because Garcia insisted that he would only do the work on that condition. Her testimony was that she had no choice but to make it a permanent contracting arrangement because this was what Garcia insisted on and she had no choice. This is patently not true.

Enrique Garcia had been laid off in March 1997 by his employer, Dicari Auto Body. While unemployed, he managed to do some odd jobs including some auto painting and bodywork. At some point, he heard about Capehorn from his friend Jose Ramirez and in mid-April they both went to the Respondent to ask for jobs *as employees*. When they got to Capehorn they spoke to two Chinese men who apparently were Wei and Tsai. They told Garcia and Ramirez that the Company was not looking to hire any employees but that they could work if they were contractors. According to Garcia, he agreed to this idea but that Ramirez turned this offer down.

Subsequent to his meeting with Wei and Tsai, Garcia talked to Li and she confirmed the offer that he work as a subcontractor. She had a document prepared but Garcia rejected it as being too onerous to him in terms of liability for accidents, etc. Another contract was prepared by Capehorn and this was executed by Garcia and dated April 15, 1997.

The arrangement was that Garcia would hire his own employees and do the work on Capehorn's premises. Garcia thereafter hired three to four people to do this work, including Ramirez who had earlier accompanied him to Capehorn to look for a job as a Capehorn employee. On May 9, 1997, Garcia registered EMG as a new business enterprise in the State of New Jersey. EMG had not existed before the contract with Capehorn and has since performed work exclusively for Capehorn at Capehorn's premises until work ran out about 7 or 8 months later. The contract between Capehorn and EMG reads as follows:

> The Contractor agrees to perform the following services on the company's behalf.
>
> Prep vans for painting
> Plastic and sanding and primer
> Inspecting vans before painting
> Painting vans
> Inspecting vans for painting quality
> Repaint if necessary to ensure quality control
>
> The contractor shall be entitled to use the premises of the body shop facility of the company and shall carry all liability insurance, workman's compensation and shall comply with all federal and state laws. The Contractor shall also be responsible for all cost prep material, paint and expenses incurred in performing the services and shall not be entitled to reimbursement of expenses of any kind. The contractor shall utilize his own tools and helpers and shall reimburse the company for any services and material provided to the contractor other than the use of premises of body shop.
>
> The contractor shall always comply/follow the company's production schedule (with minimum of 2 vans per weeks and a maximum of 4 vans per week).
>
> The case job is $1600 each van.
>
> The company will get credit of $100.00 for the first 2 vans and $50.00 for another 6 vans, which payment of the first 89 vans will be paid to "Martha Garcia" SSN: 581–43–3634.
>
> Payment shall be made after the completion of service of each van.

III. ANALYSIS

Employees who engage in an economic strike are engaged in protected concerted activity as defined by Section 7 of the Act and may not be discharged or disciplined for such activity by their employer. *NLRB v. U.S. Cold Storage Corp*., 203 F.2d 924 (5th Cir. 1953), cert. denied 346 U.S. 818 (1953). At the same time, an employer faced with an economic strike is entitled to attempt to continue its business and therefore the Board and the courts have held that it is entitled to hire replacements for the striking employees. In reaching a balance between employee and employer rights, the Board and the courts have, since at least *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938), allowed employers to hire *permanent* replacements for strikers. While it is not clear from the decision in *Mackay Radio*, or subsequent cases why this is so, its seems likely that it was based on the assumption that replacements might not be willing to cross a picket line unless they were guaranteed permanent employment status.[4]

[3] In the case of Blas Oscar Rodriguez, he first appeared on the Company's records during the week of March 24, 1997. The records indicate that he left during the week of April 21, 1997, and he next appears during the week commencing June 16, 1997. As to Veneris, the records show that he worked for 1 week in January 1997. The next time his name appears in the payroll records is during the week June 9 to 13, 1997.

[4] In 304 U.S. 333 (1938), the court found that the employer had violated Sec. 8(a)(3) of the Act when it refused to reinstate certain of the strikers, not because they had been replaced but because they were the

In *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375 (1967), the Court held that an employer having received a unconditional offer to return to work by or on behalf of economic strikers, must reinstate such strikers unless the employer can demonstrate a "legitimate and substantial" business justification for refusing to do so. In *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), the Board stated:

> [E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

When an employer asserts that there have been replacements which thereby justifies if from not reinstating some or all economic strikers, the Company has the burden of proving that the replacements are in fact permanent replacements. *NLRB v. Murray Products,* 584 F.2d 934 (9th Cir. 1978). In *Zapex Corp.,* 235 NLRB l237, l240 (1978), the Board held that the burden of proof is on the employer to show that strikers had been permanently replaced and that the hiring of temporary replacements does not excuse the employer's refusal to reinstate economic strikers who made an unconditional offer to return to work. See also *Montauk Bus Co.,* 324 NLRB 1128 (1997), and *O. E. Butterfield, Inc.,* 319 NLRB 1004 (1995) (holding strike replacements are presumed to be temporary employees and not eligible voters in a decertification election, unless the employer proves they are permanent replacements).

In the present case, although the Employer did offer reinstatement to some of the strikers shortly after they offered to return to work, it did not do so with respect to others. At the same time, it retained the services of replacement employees it had hired during the strike. Further, in at least three instances, it hired new employees after the Union had made the offer to return to work. And in two cases, instead of recalling strikers, the Company rehired, after April 29, two former employees who had previously left the Company.

Moreover, it is my conclusion that the Respondent has not proven that the strike replacements were permanent replacements. These people were hired by Managers Wei and Tsai and neither the replacements nor the people who hired them testified as to the conditions of their employment. Li testified vaguely that at some time she told some of these replacements that they had guaranteed jobs but she could not say to whom she made these alleged remarks. As I find her testimony to be unreliable in this and other respects, and as there is no documentary evidence of any kind to substantiate the Company's claim that the strikers were hired on a permanent basis, I conclude that they were hired as temporary replacements.

Insofar as the Respondent asserts that it was justified in not recalling some strikers because it had hired permanent replacements, I conclude that this defense is without merit. I therefore find that the company violated Section 8(a)(1) and (3) by not reinstating strikers to the extent that that their jobs were filled with employee replacements.

The Company also contends that it was justified in refusing to reinstate certain of the strikers to the extent that their jobs were replaced by a permanent subcontractor. Put another way, the Respondent argues that it may refuse to reinstate strikers so long as it maintains an arrangement with a permanent subcontractor whose employees replace the striking workers, irrespective of any turnover of the contractor's employees. Thus, if an employee of the contractor leaves his employment, the contractor could hire a new employee who would do the striker's work and no striker would be entitled to recall as they otherwise would under *Laidlaw* if permanent replacements had been hired by the struck employer.

An employer need not bargain with a Union and may engage *temporary* subcontractors if necessitated by a strike so long as the subcontracting does not transcend reasonable measures necessary to maintain its operations during the strike. *Shell Oil Co*., 149 NLRB 283 (1964).

In my opinion, the use of a permanent subcontractor to do struck work is substantially different from temporary subcontracting as it would, of necessity, significantly undercut the rights of strikers to obtain reinstatement. Under *Laidlaw*, supra, economic strikers are entitled to immediate recall unless their employer has hired permanent replacements. But even then, when the replacements leave their jobs, the employer is required to recall strikers as jobs open up. Thus, even if not recalled immediately, a striking employee nevertheless has a reasonable probability, by virtue of normal turnover, that at some point in the future he or she will be able to obtain his or her job back. If however, an employer was entitled to use a contractor to permanently replace strikers, this would negate the strikers' rights to recall as replacement workers left, This is because the contractor would continue to be engaged by the struck employer and the contractor could replace, at will, any of his employees who functionally stand in the same shoes as replacement employees if hired by the struck employer. Thus, the use of a permanent subcontractor to do struck work, would in my opinion upset the historically set balance between the rights of employees to engage in economic strikes without losing their jobs as opposed to the rights of employers to maintain their business operations during the course of a strike.[5]

most active union supporters. The court's opinion assumes without explication, that an employer may hire permanent replacements, finding however that this was not the reason for the employer's refusal to reinstate some of the strikers.

[5] The balance set between the right of employees to engage in economic strikes without loss of their employment status and the employer's contrary right to continue operating its business by using permanent replacements is based, I believe, on a number assumptions about which there is little empirical evidence and which might be a suitable subject for some graduate students. For example:

> To what extent, if any, are potential workers reluctant to work as temporary strike replacements as opposed to taking such jobs on a permanent basis? With the growth of contingent workers and temporary employment companies, and the lessening of any social stigma for crossing picket lines, is it true that employers

The Respondent cites *International Paper Co. v. NLRB*, 115 F.3d 1045 (D.C. Cir. 1997), for the proposition that utilizing a permanent subcontractor would not be inherently destructive of employee Section 7 rights and therefore not illegal under the Act. But that case involved the use of a permanent subcontractor during a lockout and after the employer had bargained about the use of such subcontracting. The court rejected the Board's conclusion that the use of permanent, as opposed to temporary subcontracting during a lockout, was inherently destructive. The court reasoned that inasmuch as the lockout itself was legal, and inasmuch as the employer had met its obligation to bargain about the subcontracting, the Board could not find that these two legal actions made the implementation of the permanent subcontracting arrangement to be illegal. Therefore, arguing that a lockout is the equivalent of an economic strike, the Respondent argues that if a company can use a permanent subcontractor during a lockout, it may, a fortiori, do the same where it is faced with an economic strike.

The Respondent also cites *Hawaii Meat Co. v. NLRB*, 321 F.2d 397 (9th Cir. 1963). But that case dealt with the narrow issue of whether the employer's decision to subcontract, taken at the time of an economic strike and made for the purpose of keeping the plant operating, constituted an illegal refusal to bargain under Section 8(a)(5) of the Act.

At this point, it would be appropriate to talk a little about subcontracting and the National Labor Relations Act. In *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the Supreme Court held that where an employer has a collective-bargaining relationship with a union, nondiscriminatory subcontracting constitutes a mandatory subject of bargaining and therefore, an employer violates its bargaining obligation under Section 8(a)(5) when it unilaterally subcontracts bargaining unit work without first giving the union an opportunity to bargain about the decision. The Board has reaffirmed this principle in cases such as *Torrington Industries,* 307 NLRB 809 (1992); and *Dorsey Trailers, Inc.*, 321 NLRB 616 (1996), enfd. denied 134 F.3d 125 (3d Cir. 1998).

Notwithstanding the above, if the employer's motivation for subcontracting is to retaliate against employees because they join or support a union or because they engage in concerted activity as defined in Section 7 of the Act, that subcontracting would be illegal under Section 8(a)(1) and (3) of the Act (not 8(a)(5)), even if the employer offered to bargain and did bargain in good faith with a union which represented its employees. See for example, *Delta Carbonate, Inc.*, 307 NLRB 118, 121 (1992), and *Girardi Distributors,* 307 NLRB 1497, 1516 (1992).

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faced with an economic strike cannot find temporary replacements without offering permanent positions?

When permanent replacements are hired, what is the average time that strikers are reinstated after making an unconditional offer to return to work? To what extent, if any, are economic strikers never reinstated after permanent replacements are hired?

Is there any rational and empirical justification for changing the present rules so that economic strikers, even if replaced, are guaranteed reinstatement, if not immediately, then within some specifically defined period of time after an offer to return has been made? (Perhaps 6 months or a year.)

Where as here, subcontracting is undertaken solely for the purpose of replacing strikers, and the employer thereafter refuses to reinstate employees when they offer to return to work, the inevitable consequence of those actions, and therefore their intent, is to deny employment (on either a temporary or permanent basis) to employees *because* they engaged in Section 7 protected activity. In my opinion, an employer's use of a permanent subcontractor as a justification for refusing to reinstate economic strikers constitutes, presumptively, discriminatorily, motivated conduct, unless it can show compelling justification, establishing a business necessity for using permanent subcontracting as a means of operating its business. And as noted above, the use of a permanent contractor, instead of hiring replacement employees or a temporary subcontractor, tends to shift the balance of rights away from employees and substantially negates their right to engage in concerted action as protected by Section 7 of the Act.

In *Land Air Delivery*, 286 NLRB 1131 (1987), the employees engaged in an economic strike and the employer admitted that it subcontracted all unit work after the strike commenced. The company acknowledged that it did not give notice to or bargain with the union about the decision to subcontract. Thereafter, the strikers made unconditional offers to return to work and the company failed to reinstate them. The administrative law judge found that the company violated Section 8(a)(5) by permanently contracting out all unit work without any prior notice to the union and without affording it an opportunity to bargain. The judge further found that the Respondent violated 8(a)(3) by failing to reinstate the strikers upon their unconditional offers to return to work. The Board stated:

> The Respondent urges that it was within its rights to permanently replace the strikers by contracting out the bargaining unit work without notice to or bargaining with the Union. The flaw in the Respondent's argument is that permanently contracting out the work of unit employees is not equivalent to replacement of one employee by another . . . . With regard to replacing the strikers, the Respondent had two options to assure its continued operations: the Respondent had the right to hire permanent employee replacements, the strikers thereby retaining reinstatement rights in accordance with *Laidlaw Corp*. . . . or the Respondent's admitted course of action—unilateral permanent contracting out of the work—is, absent proof that the options set forth above were unavailable to it, not permissible under the Act. Thus, we agree with the judge that the Respondent' permanent contracting out of the work previously performed by bargaining unit employees without notifying and bargaining with the Union constituted an unfair labor practice even though done in the course of a strike. Refusing to afford the strikers their reinstatement rights, in reliance on the unlawful contacting, further violated the Act as found by the Judge. [286 NLRB 1131, 1131–1132.]

In *American Cyanamid Co.*, 592 F.2d 356, 360, 361 (7th Cir. 1979), the facts involved an economic strike where the employer permanently subcontracted the work of the entire bargaining unit without notifying or bargaining with the union. The General Counsel argued that this refusal to bargain consti-

tuted an 8(a)(5) violation which then converted the strike into an unfair labor practice strike, and thereby required the employer to reinstate the employees immediately on their unconditional offer to return to work. The court, in enforcing the Board's Order, stated:

> [The Union] objects only to the Company's unilateral decision to make the arrangement permanent in the absence of an emergency. This company did not need to effectuate permanent contracting out to remain in business because the plant had been operational since the inception of the strike through temporary arrangements . . . nor was that contractor requiring the relations with the Company remain permanent as a condition of continuing to work for the Company. There has been no showing that this company would have been harmed by negotiating with the Union prior to contracting out the . . . work permanently. Therefore no justification has been shown for the company's failure to observe the bargaining obligation set forth in the Act.

In the present case, the complaint does not allege that the Respondent violated Section 8(a)(5) by failing to bargain about its decision to utilize a permanent subcontractor. And indeed as of April 15, 1997, there was no duty to notify or bargain with the Union inasmuch as the Union was not either the recognized or the certified bargaining agent. Nevertheless, the Board's conclusion in *Land Air Delivery*, supra, and *American Cyanamid,* supra, strongly suggest that the Board recognized that a decision by an employer to permanently subcontract out bargaining unit work during a strike (as opposed to temporary subcontracting) is inherently destructive of employee rights under *Laidlaw*.

I reject any suggestion by the employer that it was necessary to make a permanent subcontract with EMG. Such an assertion is based on the testimony of Li to the effect that EMG would not accept this contract unless it was made on a permanent basis. This is simply not supported by the evidence which shows that it was the Respondent's idea to have Enrique Garcia do this work as a subcontractor even though Garcia and his friend and first employee, Jose Ramirez, were perfectly willing to work as replacement employees of Capehorn. There was no indication in Garcia's testimony to support any assertion that he would not have been willing to do this work unless he was given this work as a permanent subcontractor. Indeed, the import of his testimony was the opposite.

Based on the above, it is my opinion that the Employer violated Section 8(a)(3) of the Act by failing to reinstate economic strikers immediately on their unconditional offer to return to work and further violated the Act by failing to reinstate strikers to the extent that business conditions made jobs available. In this regard, I reject the Respondent's contentions that (a) any replacements hired after the strike commenced were hired as permanent replacements and (b) that it was justified in refusing to reinstate strikers whose work was replaced by EMG as a permanent subcontractor.

To the extent that strikers were sent offers to return to work, I shall leave for compliance such issues as to whether a valid offer was tendered and/or received and if so, to what extent a striker, who otherwise would be entitled to reinstatement, may have his backpay tolled by such an offer. (Clearly, as of April 29, 1997, and thereafter, there was not enough work available for all 27 people listed as strikers on the attachment to the Union's April 29 letter.)

CONCLUSIONS OF LAW

1. By refusing to reinstate employees who engaged in a strike upon their unconditional offer to return to work, the Respondent has violated Section 8(a)(1) and (3) of the Act.

2. By the aforesaid conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As the evidence shows that the Respondent illegally refused to reinstate some of the strikers, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of such refusal, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To the extent that there are issues regarding the identify of those striking employees who would be entitled to reinstatement based on the availability of work after the offer to return was made, that can be left for resolution at the compliance stage of the proceeding. Similarly, to the extent that there are issues as to whether or not valid offers of reinstatement were made and/or received by strikers and what if any effect that would have on limiting any individual's backpay, that can also be left to compliance. (As noted above, Respondent's reinstatement offers made before the Union made the April 29, 1997 offer to return to work, are not considered to be valid offers of reinstatement.)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Capehorn Industries, Inc., Clifton, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate economic strikers to existing vacancies upon their unconditional offer to return to work.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Upon application, offer to those strikers who have not yet returned and for whom work is available, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary all persons hired as striker replacements or engaged as replacement subcontractors after March 25, 1997.

(b) Make whole any of the strikers for any loss of earnings and other benefits suffered as a result of the refusal to reinstate them to their former jobs in the manner described in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Clifton, New Jersey, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 29, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to reinstate economic strikers to existing vacancies on their unconditional offer to return to work.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on application, offer to those strikers who have not yet returned, immediate and full reinstatement to their former or substantially equivalent positions to the extent that work is available for them, without prejudice to their seniority or other rights and privileges, dismissing if necessary, all persons hired as striker replacements and place on a preferential hiring list those striker applicants for whom positions are not immediately available.

WE WILL make whole any of the strikers for any loss of earnings and other benefits suffered as a result of, and to the extent that we have illegally refused to reinstate them to their former jobs.

CAPEHORN INDUSTRIES, INC.